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In the Supreme Court of the United States

OCTOBER TERM, 1956

MITSUGI NISHIKAWA, PETITIONER

v.

JOHN FOSTER DULLES, AS SECRETARY OF STATE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

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BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the Court of Appeals (R. 65-75) is reported at 235 F. 2d 135.

JURISDICTION

The judgment of the Court of Appeals was entered on June 18, 1956 (R. 76). The petition for a writ of certiorari was filed on September 13, 1956, and was granted on November 13, 1956 (R. 77; 352 U. S. 907). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether, in an action for a declaration of citizenship, a dual-national who is alleged to have expatriated himself by serving in the armed forces

of a foreign nation has the burden of showing that the foreign military service was under duress, and whether he meets his burden merely by proving that the service was under the foreign nation's conscription laws.

2. Whether, as found by both courts below, petitioner's service in the Japanese army was not involuntary.

3. Whether Section 401 (c) of the Nationality Act of 1940, providing for the expatriation of a dual-national who voluntarily serves in the armed forces of his other country, is constitutional.

STATUTES INVOLVED

Section 503 of the Nationality Act of 1940, 54 Stat. 1137, 1171, 8 U. S. C. (1946 ed.) 903, provided in pertinent part:

> If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District of Columbia or in the district court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States. * * *

Section 401 of the Nationality Act of 1940, 54 Stat. 1137, 1168, 8 U. S. C. (1946 ed.) 801 (c), provided in pertinent part:

> A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by
>
> * * * * *
>
> (c) Entering or serving in the armed forces of a foreign state unless expressly authorized by the laws of the United States, if he has or acquires the nationality of such foreign state;
>
> * * * * *

STATEMENT

Petitioner seeks reversal of the judgment of the Court of Appeals for the Ninth Circuit (R. 76) affirming the judgment of the District Court for the Southern District of California which dismissed his action for a judgment declaring him to be a citizen of the United States. The trial court found that petitioner had expatriated himself under Section 401 (c) of the Nationality Act of 1940, *supra*, "by reason of his voluntary entry and service in the Japanese Armed Forces while a national of Japan * * *" (R. 12-13).

The evidence, other than documents, before the District Court consisted solely of petitioner's testimony. He was born in the United States at Artesia, California, on April 20, 1916 (R. 17). Until he was 23 years of age (R. 25), he lived in the United States and received his education in American schools (R. 18). In August 1939, following his graduation from the University of California with a degree in engineering (R. 46), he went to Japan in order to visit and study, intending to remain between two and five years (R. 26). At the time, he knew he was also a national of Japan whose name was in the family register there

(R. 34), and that Japan was fighting in Manchuria (R. 25).

In Japan, petitioner began to study the Japanese language under a tutor (R. 35). When his father, a resident of the United States (R. 29) who had paid his passage to Japan and was to finance his studies there, died in November, 1939, leaving him without funds, he took a position with the Nakajima Company, an aircraft manufacturer, in Ota City, Japan (R. 27).

About June 1940, pursuant to the Japanese compulsory military conscription law (R. 22-23), petitioner was required to take a physical examination (R. 18), and on March 1, 1941, under the same law, he was inducted into the Japanese army (R. 18). Between the time petitioner was notified to report for the physical examination and the time he actually entered the Japanese army, he made no effort to go to United States consular officials in Japan to tell them that he did not wish to serve in the Japanese army (R. 26-27), nor did he seek to return to the United States (R. 11). He also made no effort during this time to renounce his Japanese nationality, and he did not tell any Japanese official that he was an American citizen (R. 11-12, 27). Nor did he protest his induction into the army (R. 30). He testified that he failed to protest his induction because rumors he had heard of Kempi Tai (police) brutality, which "might have been true", made him afraid to do so (R. 37). He explained his failure to go to an American consular office as based upon information received from a Nisei friend, employed at the embassy, that the

American Consulate could not do anything for a dual-citizen Nisei (R. 43, 47-48). He also said that, at that time, the Japanese police were making monthly checks on his boarding house (R. 44).

Petitioner testified that he corresponded with his friends in the United States once a week (R. 28) and with his mother once every two weeks (R. 30), and that he met with Japanese friends who were American citizens (R. 28), but that he did not know that the United States was drafting men into the United States Army (R. 28, 30). He testified that he did not read any newspapers while in Japan (R. 29) and had no interest in Japanese national affairs (R. 47). He said that he knew England and France were then waging a war in Europe against Germany and Italy (R. 46), but did not know there was then a "cold" war between Japan and the United States (R. 46).

Petitioner testified that, upon his induction into the Japanese army, he was assigned to a training unit in Niwahuki for three or four months and was transferred to the 60th Air Force Regiment, also known as the 2378th Bomber Regiment, which was then in China (R. 30). After six months in China, he was transferred to French Indo-China, where he was at the time when war broke out with the United States (R. 32). After the fall of Singapore, he passed through there en route to the Philippines, where he arrived in February 1942 (R. 32). It was his duty in the bomber squadron to clean the fuselages of airplanes, to change sparkplugs and clean timers in air-

plane engines, and to do "kitchen police" duty (R. 32-34).

When Japan attacked the United States, while petitioner was in Indo-China, he said that he told Japanese non-commissioned officers that "there wouldn't be any chance of Japan winning the war at all" (R. 37-38). The enlisted personnel of higher rank gave him a "thorough beating" that night and "for about almost every day for a month" following, and on a couple of days a month thereafter (R. 38). While in the Japanese army, he was nicknamed "America", according to his testimony (R. 38).

Petitioner was discharged from the Japanese army in August 1945. He went to the United States Consulate, on or about December 1, 1947, and applied for a passport to the United States (R. 19). About a year later, he received a Certificate of Loss of the Nationality of the United States, executed February 16, 1948, and approved by the Department of State on April 15, 1949 (R. 19-21).

On December 5, 1952, petitioner filed a complaint in the United States District Court for the Southern District of California against the Secretary of State for a decree adjudging him to be a citizen or a national of the United States (R. 3-5). After a trial without a jury, the court found as a fact, *inter alia*, "VIII. It is true that plaintiff's entry and service in the Japanese Armed Forces was his free and voluntary act",[1] and entered a judgment that "Plaintiff

[1] From the bench at the close of the trial, the court said in (R. 55-58):

"Well, of course, the short answer to the entire argument,

has lost his United States nationality, pursuant to Section 401 (c) of the Nationality Act of 1940, by reason of his voluntary entry and service in the Japanese Armed Forces while a national of Japan" (R. 10–13). Among the court's subsidiary findings were these: that petitioner journeyed to Japan, in August 1939, "knowing at that time that he was likely to be

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counsel, is that the court simply does not believe the testimony of the witness. That is all. I simply do not believe his testimony.

"He went to Japan when he was 23 years of age. He remained in Japan, and the entire world was in a turmoil all the time he was in Japan. War is being waged in Europe. He is 23 years old. This isn't a case of a young boy that was taken to Japan in the early days like most of these cases, where a young boy was taken to Japan as an infant and he was reared in Japan and caught over there during the war and then was drafted into the service. Of course, there wasn't anything he could do. There was no way he could leave Japan. He was drafted. He had no choice. He went into the service or he went to jail.

"We don't have a situation like that. We have a young man who wasn't forced, in the first place, wasn't forced to go over to Japan, because he wasn't a child. He was 23 years old. He was a graduate from one of our greatest institutions of learning in this country with an engineering degree. And he went over there, and he knew he was registered over there in the family register, and he went over to do his duty as a Japanese national. That was the very purpose. That is why Congress enacted that legislation.

"How ridiculous for me to believe his story that in the summer of 1940, when he was notified to report, that for a year he didn't do anything to leave Japan and didn't make any effort to leave Japan. He didn't go to see the American authority. And mind you, this is a university graduate. This isn't a young fellow that is confused and lost and doesn't know his way around. This is a university graduate. And because someone told him that the Kempi Tai would beat him up if he tried to get out or if he spoke to the Americans. He just refrained from protecting his rights as a citizen. He made no effort to return to this country. If it were a plot in the wildest sort of a television story it couldn't be believed, couldn't be accredited by anyone seeking the truth.

called for military service in the Japanese Armed Forces" (R. 11); that he made no effort to return to the United States, to avoid entry or service in the Japanese army, or to renounce his Japanese citizenship (R. 11–12); and that he did not protest his induction or attempt to communicate with Japanese or American officials (R. 11–12).

The court simply does not believe that testimony. That is all there is to the case.

"I believe this: He went into the service because he wanted to go into the service. I believe he went to Japan, and I believe that he waited for them to call him to the service, because under the laws of Japan that's the manner in which they took their men into the service under the draft laws, the conscription laws. That was their system of building up their armed forces. * * *

* * * * *

* * * All I am saying is that he went over because as a Japanese citizen under the laws of Japan it was necessary for him to serve his hitch in the army. He went over there to serve his hitch in the army. He went over and he waited until they reached him on the draft, and when they did he was drafted. And that is what he was there for. And his service could not be considered involuntary. Reference has been made to 1940, and when he was notified in 1940 did he get out? Because then he was notified to report. And for a year between 1940 and 1941 he made no effort to get out. He made no effort to leave the country. We just happen to say 1940 because that is the time he said he was notified. But it isn't necessary to say 1940. The fact is that he, a university graduate, a man with that education, he must have known even before they told him, he must have known that they have armies and he must have known that they conscript men in those armies. He must have known, and he testifies that he knew, that he was registered in the family register over there. He knew, and he has testified he knew, he had dual nationality. He knew he was going to be drafted. So even before they notified him it was his turn he knew and he was waiting for it. He was waiting for that draft, for that call to serve. He made no effort to leave there.

* * * * *"

SUMMARY OF ARGUMENT

There is no question that petitioner's original United States citizenship was properly shown, and also that he served in the Japanese army while a Japanese national—conduct which Section 401 (c) of the Nationality Act of 1940 specifically designates as expatriating. The controversy centers on (a) the voluntariness of petitioner's service in the Japanese army, and the burden of proof on that issue of duress, and (b) the constitutional validity of Section 401 (c).

I

Our position is that, once the Government has proved (by clear and convincing evidence) that the citizen-claimant has performed an act of expatriation, the burden then shifts to him to make at least a *prima facie* showing of involuntariness; further, we contend that the ultimate burden of proof on the question of involuntariness rests on the citizenship-claimant, not on the Government. Petitioner, in our view, has met neither the initial burden of coming forward with evidence sufficient to make a *prima facie* showing of duress nor the ultimate burden of proof.

A. The burden of coming forward with evidence of duress is on the claimant. As in almost every other case of individual conduct—including the commission of criminal acts—the law presumes that the performance of a statutory act of expatriation (such as the act of joining the Japanese army in this case) is conscious and voluntary, and requires the person adversely affected by that presumption, who is in the best position to know whether the act was performed freely

or not, to initiate consideration of duress and to make an adequate *prima facie* showing. Unless that is done, the act must be considered voluntary. All the lower federal courts are in agreement on this fundamental proposition with respect to expatriation.[2]

B. Petitioner's only evidence bearing on duress which was believed by the trial court was that he was drafted into the Japanese army; he urges that this mere fact of conscription was enough of a *prima facie* showing to sustain his burden of coming forward. But conscription alone, without more, is not enough; the showing of involuntariness must appear from all the circumstances surrounding the foreign service. See this Court's orders of remand in *Murata* v. *Acheson*, 342 U. S. 900, and *Okimura* v. *Acheson*, 342 U. S. 899; and cf. *Mandoli* v. *Acheson*, 344 U. S. 133, 139–140 (dissenting opinion). When it enacted Section 401 (c) in 1940, Congress knew that conscription was the rule abroad, and it could not have intended to excuse foreign military service merely because it was performed in response to a draft notice.

Those called to foreign military duty can, and often do, show the involuntariness of this service by proof of protest to the foreign authorities or to American consular officials, or by attempts to return to this country, or by efforts to renounce the foreign nationality. Petitioner, a university graduate, did none of those things during the nine-months period (June 1940–March 1941) in which he knew he was going to

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[2] *Gonzales* v. *Landon*, 350 U. S. 920, did not deal with this issue, but solely with the burden of proof of the expatriating act itself, i. e., the service in the Japanese army.

be drafted. In fact, the trial court believed that he deliberately went to Japan in August 1939 (when he was 23 years old) knowing he would be called to service; and wishing to serve (R. 11, 56–57).

Those lower federal courts which have thought mere proof of conscription sufficient to show duress have mistakenly rested on the Attorney General's opinion in the *Panzica* case, 41 Op. Atty. Gen., No. 16, which dealt with the taking of an oath of allegiance to Italy by an Italian-American dual national who, after being brought up from infancy in Italy, was inducted into the Fascist Army in 1931 and then required to take the oath.[5] The Attorney General limited his ruling to that particular situation of a dual national already serving in the Fascist Army, and carefully indicated that the "surrounding circumstances" must always be considered. Petitioner's situation here is entirely different from that of *Panzica*; he was not already in service when he committed the expatriating act and the surrounding circumstances do not show that his entry into service was under duress.

On this view that petitioner did not sustain his burden of producing evidence of duress merely by showing that he was conscripted,[6] there is no need to reach the issue of ultimate burden of proof where

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[5] Service in a foreign army was not an act of expatriation before the Nationality Act of 1940, but the taking of a foreign oath of allegiance was made expatriating by the Act of March 2, 1907, 34 Stat. 1228.

[6] The trial court did not believe petitioner's other evidence as to duress, and these findings were affirmed by the Court of Appeals (*supra*, pp. 6–8).

the claimant does make a *prima facie* showing of involuntariness. Petitioner did not even reach that point.

C. If, however, proof of conscription is enough for a *prima facie* showing, the question of ultimate burden of proof is presented. In our view, that burden lies on the claimant.

1. The legislative history of Section 401 (c) supports this position. It reveals, with respect to voluntariness of service, that the State Department desired Congress to impose a *conclusive* presumption of voluntariness in all dual-nationality cases, while the Labor and Justice Departments, opposing the State Department proposal for a change in the bill, believed that the *claimant* should be permitted in all cases to establish duress, if he could. See *Dos Reis* v. *Nicolls*, 161 F. 2d 860, 863-868 (C. A. 1). Moreover, the House Committee did not accept a proposal by an interested organization that the word "voluntarily" be inserted in Section 401 (c) (as well as in other subsections of Section 401) as an integral part of the expatriation act; and there are other indications that the general burden of proving his citizenship should be on the claimant.

In addition, Section 402 of the Act declares a presumption that any dual-national who remains for six months or longer in the country of his other nationality shall have expatriated himself under either Section 401 (c) or (d) (which concerns the taking of a foreign government post), "and such presumption shall exist until overcome * * *." This section creates a "rebuttable presumption of expatriation" (*Kawakita* v. *United States*, 343 U. S. 717, 730) which

can be overcome by proof by the claimant that he did not enter the foreign army or take a government job. Certainly, in a case like this where the claimant *did* enter the army, it is *a fortiori* that the burden is upon him to excuse that service, if he can, by showing that it was involuntary.

In sum, the legislative history and the structure of the Act show that proof of involuntariness is not a condition precedent to expatriation, to be proved by the Government; but rather a proviso or defense to be proved by the claimant.

2. This rule on the burden of proof of duress accords with that established in the land-grant and patent cases (from which the Court drew the standard of "clear and convincing" proof for denaturalization and expatriation cases), as well as in other, comparable, cases. The general principle is that the Government need not negative the existence of special facts which are within the knowledge or experience of the defendant or claimant; the burden is his to show that such facts exist.

D. Whatever the burden of proof as to duress, the voluntariness of petitioner's army service has been sufficiently established.

1. If petitioner has the ultimate burden of proof, he has clearly failed. The trial court and the Court of Appeals have held against him on his own evidence.

2. Even assuming that the Government has the burden, it has been borne here. The trial judge did not impose the burden on petitioner but simply disbelieved his protestations of fear, and found that he was willing to be drafted. The Court of Appeals af-

firmed those findings (R. 73–74). These two-court findings of fact are soundly grounded in the evidence, as the Statement shows, *supra*, pp. 3–8. Petitioner's whole course of conduct is diametrically opposed to his contention that his service was involuntary.

Petitioner attempts to bolster the record by certain materials, bearing on conditions in Japan, of which he asks the Court to take judicial notice although none of it was introduced at the trial by experienced counsel. Petitioner chose at the trial to stand on his own testimony, and cannot now retry the case. In any event, the general materials he now urges on the Court do not negative the specific conclusions drawn by the courts below from his personal testimony.

II

Our argument as to the validity of Section 401 (e) is set forth in our brief in *Perez* v. *Brownell*, No. 572, this Term. Petitioner seeks to avoid the constitutional issue by construing the section so as not to cover dual nationals, but this contention is obviously unavailing since the section, by its express terms (*supra*, p. 3), can cover *only* dual-nationals.

ARGUMENT

Introduction

A. The expatriating act in this case was petitioner's joining of the army of Japan, a foreign country of

[1] Although we suggest that the standard of proof of involuntariness (if the Government has the burden) should not be "clear and convincing evidence", but the preponderance of the evidence, we believe, as did the Court of Appeals, that the higher standard was met here.

which he was also a national. Such conduct was made to result in loss of American nationality by Section 401 of the Nationality Act of 1940, which provided:

> A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:
>
> * * * * *
>
> (c) Entering or serving in the armed forces of a foreign state unless expressly authorized by the laws of the United States, if he has or acquires the nationality of such foreign state.*

It is common ground between the parties that (a) the expatriating act itself—the act of joining the Japanese army—must be proved by the Government

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* The comparable (but different) provision of the Immigration and Nationality Act of 1952 is Section 349, 8 U. S. C. 1481, which provides:

"(a) From and after the effective date of this chapter a person who is a national of the United States whether by birth or naturalization, shall lose his nationality by

* * * * *

"(3) entering, or serving in, the armed forces of a foreign state unless, prior to such entry or service, such entry or service is specifically authorized in writing by the Secretary of State and the Secretary of Defense: *Provided*, That the entry into such service by a person prior to the attainment of his eighteenth birthday shall serve to expatriate such person only if there exists an option to secure a release from such service and such person fails to exercise such option at the attainment of his eighteenth birthday; or

* * * * *

"(b) Any person who commits or performs any act specified in subsection (a) shall be conclusively presumed to have done so voluntarily and without having been subjected to duress of any kind, if such person at the time of the act was a national of the state in which the act was performed and had been physically present in such state for a period or periods totalling ten years or more immediately prior to such act."

by clear, convincing, and unequivocal evidence (*Gonzales* v. *Landon*, 350 U. S. 920; cf. *Schneiderman* v. *United States*, 320 U. S. 118; *Baumgartner* v. *United States*, 322 U. S. 665), (b) this expatriating act must have been voluntarily performed (e. g., *Dos Reis* v. *Nicolls*, 161 F. 2d 860 (C. A. 1); *Acheson* v. *Murakami*, 176 F. 2d 953 (C. A. 9)), and (c) it is immaterial that the petitioner may not have known that his entering the Japanese army would result in his expatriation (*Savorgnan* v. *United States*, 338 U. S. 491).

The controversy centers on the further issues of the burden and scope of proof of voluntariness, and the question of the validity of the statute. With respect to the burden and scope of proof of voluntariness, the problems are: (i) who has the burden of going forward with evidence of involuntariness, and the ultimate burden of proving it; (ii) if the Government has the burden of proof, must it prove voluntariness (as well as the performance of the expatriating act) by clear and convincing evidence; and (iii) if petitioner has the burden, does he satisfy it merely by showing that he was conscripted into the foreign army. Petitioner contends that the Ninth Circuit erred in holding that he had the burden of proving that his foreign military service was involuntary. Instead, he maintains that the Government must prove that his expatriating act was voluntary by clear and convincing evidence, and that, measured

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[1] The issue of the constitutionality of Section 401 (c) is similar to that presented in *Perez* v. *Brownell*, No. 572, this Term, and the Government's position on that question is set forth in its brief in No. 572. See *infra*, p. 50.

by this standard, there was a failure to prove voluntariness. It is the Government's position, on the other hand, that the question of voluntariness is one peculiarly within the knowledge of petitioner and that he must prove involuntariness by affirmative evidence of duress in order to avoid the effect of his expatriating act. It is also our view that petitioner did not make a *prima facie* showing of involuntariness, calling for rebuttal evidence by the Government, merely when he introduced evidence of conscription.

B. We deal at length, in the body of this brief, with these questions of the burden and scope of proof of voluntariness. At this point, it may be helpful to give a step-by-step analysis of petitioner's action, an analysis which will give a summary survey of the problems and indicate at each step the various positions (of the present parties, as well as of the lower federal courts in general) on burden and scope of proof:—

1. Petitioner brought an action for a judgment declaring him to be a citizen of the United States (R. 3-5). It is elementary that the burden of proof, in its primary sense, rests upon the party who, as determined by the pleadings, asserts the affirmative of an issue and it remains there until the termination of the action. Thus, petitioner had the general, over-all, burden of proving his citizenship. *Alata* v. *Dulles*, 221 F. 2d 52 (C. A. D. C.); *Augello* v. *Dulles*, 220 F. 2d 344 (C. A. 2); *Monaco* v. *Dulles*, 210 F. 2d 760 (C. A. 2). As the first step in proving citizenship, petitioner made a *prima facie* case by showing his birth in California (R. 17). The Government then

had the burden of going forward with evidence in rebuttal of this *prima facie* proof of citizenship. Up to this point, there is no real problem.

2. In meeting its burden of going forward, the Government showed—indisputably, by clear, convincing, and unequivocal proof—that petitioner served in the Japanese army and that he was at that time also a Japanese national. Under Section 401 (c), that service is a specific act of expatriation. In our view, the Government fully sustained its burden of going forward at this point, and the next step was up to petitioner. So far as we are aware, there is universal agreement among the courts on this issue. The Court of Appeals for the Second Circuit stated the rule succinctly in *Pandolfo* v. *Acheson*, 202 F. 2d 38, 40–41, as follows:

> * * * The plaintiff has the burden of proving that he is a United States citizen. He made a *prima facie* case by alleging and proving his birth in New York. The Government then had the burden of showing that he had expatriated himself. This it did by proof of his oath of allegiance to the King of Italy. *Presumptively this oath was voluntarily taken.* He then had the burden of going forward with evidence to establish that it was taken under duress. * * * [Emphasis added.]

Petitioner, however, takes a different view. His theory is that "voluntariness" is an integral element of the expatriating act which the Government must fully prove in order to make out a *prima facie* case of expatriation. The answer is that this claim has no more legal justification than the assertion that the

prosecution has the initial burden of proving sanity in a homicide case. Even if the "case" were viewed as having been initiated by the Government in issuing the Certificate of Loss of Nationality (*supra*, p. 6), the result would be the same. The Government would have the primary burden of proving that petitioner performed an expatriating act. In showing foreign military service by clear and convincing evidence, the Government would make a *prima facie* case. Regardless of who the affirmative litigant may happen to be, it is our position (as well as that of all the lower federal courts) that, once the presumptively expatriating act has been proved, the citizenship-claimant must make a showing of involuntariness, as in any other case where the affirmative defense of duress is said to be involved.

3. The divergence of judicial views appears at the next step, in which the question arises as to the kind of evidence which will show duress and shift the burden of going forward with proof of voluntariness back to the Government. There are decisions which seem to hold that mere proof by the claimant that the foreign military service was pursuant to conscription is sufficient to make a *prima facie* defense of duress. However, the district judge, as the fact-finder in this case, ruled that conscription, as far as petitioner was concerned, did not show involuntariness. The Court of Appeals for the Ninth Circuit, as well as other federal courts, have considered this approach to be reasonable and correct. Our position, in accord with these courts, is that petitioner did not make a *prima facie* showing by merely proving his conscription.

The bare fact of entering the service today, in response to some form of universal military training, is of neutral import as to a particular individual unless other considerations give it evidential weight.

If we are correct in this view, the present case ends at this point. Petitioner proved no more than that he was drafted. The trial judge did not believe his other weak claims of duress (*supra*, pp. 6–8), and the Ninth Circuit has explicitly affirmed the trial findings (R. 73–74). If the bare fact of conscription is insufficient, petitioner did not make an adequate showing to overcome the presumption of the voluntariness of his expatriating act, and that expatriating act effectively negatives his claim to United States nationality.

4. Assuming, however, that petitioner's showing of conscription can be said to neutralize the presumption of voluntariness in performing the expatriating act, or at least to shift the burden of going forward with proof of voluntariness back to the Government, the question would then arise as to the ultimate burden of proof. Is it upon the Government, in the final analysis, to prove voluntariness, or upon the petitioner to prove involuntariness? The legislative history of Section 401 (c) shows that Congress intended foreign military service under the statute to be an expatriating act *unless petitioner shows his act to be involuntary, i. e.*, that the question of voluntariness is in the nature of a *proviso* rather than a *condition precedent* to expatriation. Hence, the ultimate burden rests on the claimant to show involuntariness and not on the Government to show a free choice. In this case, petitioner clearly did not meet that burden.

5. Finally, if petitioner is right and the full burden is on the Government, there is the question of whether the Government did prove in this case—and it so, by clear and convincing evidence—that petitioner voluntarily performed his expatriating act of joining the Japanese army.

In Point I, *infra*, pp. 21-30, we shall spell out our reasons for the Government's positions we have just outlined. Point II, *infra*, p. 30-51 refers to our brief in No. 572 for the argument on the constitutionality of Section 401 (e).

I. Petitioner has the burden of proving duress, if he wishes to avoid the effect of the statutory expatriating act of serving in the armed forces of a foreign state, and he has failed to sustain that burden

Since petitioner's citizenship by birth was properly proved, and there is also no question that he served in the Japanese army while a Japanese national (*supra*, pp. 3-4 (see Pet. Br. pp. 6-8)), we might stop with the claim that his military service was involuntary, the second step in the analysis given above in the Introduction (*supra*, p. 18).

A. Petitioner's expatriating act was presumptively voluntary and the Government did not have to come forward with evidence of voluntariness—the burden of coming forward was on petitioner.

Petitioner has the burden of going forward with evidence of involuntariness because, since the expatriating act has been proved by clear and convincing evidence as here, a presumption arises that the act was voluntary and petitioner must overcome that presumption by presenting some evidence of duress, if he wishes to avoid the effect of the statute. *Nishikawa* v. [illegible]

Dallas, 221 F. 2d 52, 54 (C. A. D. C.); *Vaquilla v. Dulles*, 220 F. 2d 344, 346 (C. A. 2); *Randolph v. Acheson*, 202 F. 2d 38, 40-41 (C. A. 2); *McGrath v. Nagle*, 186 F. 2d 209 (C. A. 9). There is no real dispute among the courts as to this proposition. The cases relied upon by petitioner (*Lehmann v. Acheson*, 206 F. 2d 302 (C. A. 3); *Vaquilla v. Dulles*, 220 F. 2d 344 (C. A. 2); *Stipa v. Dulles*, 233 F. 2d 551 (C. A. 3); *Nishikawa v. Dulles*, 125 F. 2d 402 (C. A. 7)) [illegible] that these circuits agree that the [illegible] forward with evidence sufficient to avoid the [illegible] effect of an [illegible] upon the plaintiff dual national [illegible]. In the *Lehmann* case, *supra*, pp. 307-308, the court noted [illegible] the Government [illegible] that the presumption that his entry and [illegible] the United States was a result of conservation [illegible] therefore impliedly acknowledged that the plaintiff met the burden which the court ruled he must meet to avoid that his foreign residence was motivated by the purpose and therefore involuntary. In *Stipa*, *supra*, p. 557, the court recognized that the [illegible] of showing duress to avoid expatriation [illegible] of an oath of allegiance to a foreign government rested upon the plaintiff when it stated that "the fact of the plaintiff's examination into the [illegible] duress to preclude a finding that the [illegible] taking of the oath was [illegible]." In *Nishikawa*, *supra*, though the court spoke generally of the heavy burden upon the Government in expatriation cases, it recognized that duress was a defense to be brought forward by the plaintiff

...ued to be returned to the Government. With the aid ... judicial notice of economic conditions in post-war Italy, the court held that the plaintiff had met the ... burden of proving by the preponderance of evidence ... economic pressure.

There is ... support ... the rule of these cases ... that there ... the ... of ... that the plaintiff ... the ... of ... of duress for some special ... Since, in ordinary ... the ... performed ... to ... and ... that ... voluntarily, ... the ... that ... charged ... the ... Court in *Duress*, ... 180, ... that ... would ... affirmative ... of the ... mentioned. But a ... ... and ... *Battle v. United States*, ... 30, 38; *Holmes v. United States*, ... 441. The ... to use the ... that ... was ... at the ... of the ... *United States*, 227 ... 40, 54). Similarly, there is a presumption in the ... courts that ... are voluntary and ... to be ... by the defendant ... of proving ... was not proved ... that the plaintiff ... would ... payments.

who made the confession." *Wilson v. United States*, 162 U. S. 613, 622. *Ah Yuk Chung v. United States*, 91 F. 2d 805, 806 (C. A. 9); *Murphy v. United States*, 280 Fed. 801, 808 (C. A. 7). The burden is not upon the Government initially to show its voluntary character. *Brady v. United States*, 224 F. 2d 348 (C. A. 6); *Gray v. United States*, 9 F. 2d 337, 339 (C. A. 9). As Wigmore states: "This is the practical and natural rule; for (1) there is any reason to object to the confession, he can always do better than the defendant" (8 Wigmore, Evidence, § 2067 (3d ed.)).

In general, the law reasonably assesses that proscribed conduct producing volition is not done under duress. (See) that it is done voluntarily. This presumption is implicit in the concept that duress is an affirmative defense. Rule 8 (c), F. R. Civ. P.), since there would be no reason for going forward with affirmative evidence of duress unless it were to rebut a presumption of voluntariness. Most human acts are done voluntarily in the reasonable exercise of free will, and it is well recognized the matter would be peculiarly within the knowledge of the one coerced. There is no reason why that general principle should not apply [illegible] the performance of an act of expatriation.

Gonzales v. Landon, 350 U. S. 920, did not hold to the contrary. That case involved the burden of proof of the expatriating act itself, not the burden of proof, or the burden of going forward with evidence of some kind, of duress which is alleged to avoid the effect of the expatriating act, once that act has been properly proved. See *supra*, pp. 44-45; R. 74-75.

B. All the circumstances surrounding foreign military service must be considered in determining voluntariness, and the mere fact of conscription—which is all that petitioner showed—is insufficient to establish a *prima facie* defense of involuntariness.

Here, although petitioner's argument is that he could have prevailed without presenting any evidence on duress, because the burden of making a *prima facie* showing of voluntariness was on the Government (*supra*, pp. 18-19), the fact is that he did bring forward some evidence bearing on involuntariness, evidence believed by the trial court. The evidence was the proof that he was drafted into the Japanese army. Petitioner argues that this was sufficient for a *prima facie* showing of duress, and in this he appears to be supported by the Second and Third Circuits (*Angilla* v. *Dulles*, 220 F. 2d 344 (C. A. 2); *Lehmann* v. *Acheson*, 206 F. 2d 592 (C. A. 3); *Perri* v. *Dulles*, 206 F. 2d 586 (C. A. 3)).[1] We agree, on the other hand, with the courts below (and with other courts) that induction into foreign military service under a conscription law is, standing alone, insufficient to establish involuntariness of service under the Nationality Act of 1940. *Mata* v. *Dulles*, 221 F. 2d 52, 55 (C. A. D. C.); *Acheson* v. *Maenza*, 202 F. 2d 453, 457-458 (C. A. D. C.); see also the dissenting opinion in *Mandoli* v. *Acheson*, 344 U. S. 133, 139-140.

1. In our view, all the surrounding circumstances, and the reasonable inferences to be drawn therefrom,

[1] The rest of petitioner's testimony as to duress (*supra*, pp. 4-5) was not credited by the trial court. See *supra*, pp. 6-8; *infra*, pp. 45-48.

must be considered in determining whether a call to arms was answered voluntarily or involuntarily. See *Mitsuta* v. *Acheson*, 342 U. S. 900 and *Okimura* v. *Acheson*, 342 U. S. 898, where the Court worded its orders of remand in those general terms. In holding that duress cannot be inferred from the mere fact of conscription, the Court of Appeals in the *Mitsuta* case, *supra*, said:

> To follow appellee's view would be largely to nullify the Congressional mandate, for it is an undeniable fact that today military service pursuant to a system of conscription or some variant of universal military training is the rule rather than the exception in almost all foreign countries. Consequently, were we to espouse the theory urged upon us by appellee, no one except only those few whose voluntary enlistment could be proved and those serving in the comparatively rare units comparable to our National Guard would fall within the ambit of Section 401 (e). Congress cannot have intended to permit almost every foreign serviceman to escape the impact of the statute. Moreover, there can be no doubt that military service is frequently performed willingly, freely, even voluntarily, although technically there is no enlistment but conscription under a "compulsory" service law. We are not ready to believe that everyone inducted into an army, a navy, or an air force, performs his service solely because of the proximity of the court martial or the police station. Duress cannot be inferred from the mere fact of conscription.

Similarly, the court in *Hamamoto* v. *Acheson*, 98 F. Supp. 904, 905 (S. D. Cal.), stated:

> To accept that reasoning is to defeat the Congressional design to discourage dual nationality which is implicit in the statute. Can we believe that Congress intended the Act to be ineffective with relation to foreign states that followed a policy of conscription in the recruitment of their armies? Can we say that the hundreds of thousands of United States servicemen who were conscripted and served during the last war were involuntarily forced into the service under duress? On the contrary, when they answered the call to arms *without resistance* their action was voluntary and this included those who did not view the prospect of army life with relish as well as those imbued with the zeal of patriotism.

Entering the service in response to some form of universal military training should be of neutral import as to a particular individual, unless other considerations give it evidential weight.

Petitioner's argument, in this connection, that evidence of failure to seek relief from service is incompetent seems unsubstantial. Failure to seek the assistance of American consular officers when faced with conscription, or failure to protest induction to foreign authorities, should be considered as relevant to the general question of voluntariness of service by one who claims American citizenship. *Angelio* v. *Dulles*, 220 F. 2d 344 (C. A. 2); *Pandolfo* v. *Acheson*, 202 F. 2d 38 (C. A. 2). Efforts by American dual

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The Court of Appeals for the Third Circuit has considered such "acts of omission" irrelevant on the question of voluntariness. See *Lehmann* v. *Acheson*, 206 F. 2d 392 (C. A. 3), discussed *infra*, pp. 29, 34.

nationals to obtain consular intervention, or to avoid foreign service, by coming to this country, have often been considered competent evidence indicating involuntariness (cf. *Mandoli* v. *Acheson*, 344 U. S. 133; *Veta* v. *Dulles*, 221 F. 2d 52 (C. A. D. C.); *Acheson* v. *Maenza*, 202 F. 2d 453 (C. A. D. C.); *Dos Reis* v. *Wells*, 461 F. 2d 800 (C. A. 1)). By the same token, the converse should be true; petitioner, an educated man, would logically have gone to the American consulate, in 1940 or early 1941, if he really wished to avoid Japanese military service, or he would have sought some relief from the Japanese authorities.[1]

The fact that reliance is placed on "inaction" does not render such evidence irrelevant. Inaction often has a direct bearing on expatriation. The letter of submittal to the President from the Cabinet Committee which made the original draft of the 1940 Act (Hearings before the Committee on Immigration and Naturalization, House Committee Print, p. 608, 76th Cong., 1st Sess.) stated:

> None of the various provisions in the Code concerning loss of American nationality * * * is designed to be punitive or to interfere with freedom of action. They are merely intended to deprive persons of American nationality when such persons, by their own acts, *or inaction*, show that their real attachment is to the foreign country and not to the United States. [Emphasis added.]

[1] We repeat that the trial court disbelieved petitioner's explanations as to why he did not seek relief from the Japanese authorities or ask for American intervention. *Supra*, pp. 6 n. 25. The Court of Appeals confirmed those findings (R. 73, 74).

When one enters the army of a foreign state without protest, either to the foreign government or to the United States, it may reasonably be inferred that his service is voluntary, and that his sense of duty attaches to the foreign government rather than to the United States, particularly when there are added factors as in this case. See *infra*, pp. 31–32, 45–48.

2. The Second Circuit, in *Augello* v. *Dulles*, 220 F. 2d 344, and the Third Circuit, in *Lehmann* v. *Acheson*, 206 F. 2d 592, and *Perri* v. *Dulles*, 206 F. 2d 586, have considered conscription, in itself, as creating a sufficient presumption of involuntariness. *Augello* and *Perri* involved expatriation for taking an oath to the King of Italy by Italian dual-nationals as a concomitant of their military service. The *Lehmann* case involved conscription into the Swiss army. The courts in all three cases, however, rested on 41 Op. Atty. Gen., Op. No. 16, in support of their conclusion. The opinion of the Attorney General referred to an Italian dual-national named Panzica who was taken to Italy in 1910 when he was 9 years old. He grew up in Italy and was inducted in 1931, under the Fascist regime, for six months' service under a universal military training program. Foreign military service was not an expatriating act until after the Nationality Act of 1940 became effective, and the Government sought to expatriate Panzica for taking an oath of allegiance to the King of Italy after he had been conscripted in 1931. Section 2 of the Act of March 2, 1907 (34 Stat. 1228) made the taking of such an oath an expatriating act.

The ruling of the Attorney General was restricted in application to the *Panzica* case. He stated:

> In my opinion, the choice of *taking the oath* or violating the law was, *for a soldier in the army of Fascist Italy*, no choice at all. Mr. Panzica's oath can only be regarded as having been taken under legal compulsion amounting to duress. [Emphasis added.]

Panzica was already a soldier, and the expatriating act was the taking of an oath of allegiance. There is a significant distinction between the duress placed upon one already a soldier to take the oath after he has been subjected to military authority and has no alternative but to submit, and the case of an American citizen threatened with conscription but who could still seek and perhaps obtain aid from the Government of the United States. In 1931, at the time of the alleged expatriating act in the *Panzica* case, foreign military service did not expatriate. It was only when an oath was taken that one could be expatriated, and it would be virtually impossible for our Government to obtain an exception for a dual-national from taking an oath in the foreign army of his other country into which he had already been inducted.

Moreover, the opinion of the Attorney General continues:

> I do not mean to say that military service or the taking of an oath of allegiance, when performed in compliance with the law of a foreign country, can never constitute an act of expatriation. Generally, it may be assumed that an act performed under legal compulsion lacks the voluntariness of choice that is essential to ac-

> complish expatriation. However, the surrounding circumstances may show a genuine desire to serve and to adhere to the foreign country, rather than mere submission to its laws. Suffice it to say that there is no indication of any such desire in Mr. Panzica's record. Accordingly, it is my opinion that Mr. Panzica did not lose his United States citizenship by virtue of having taken the oath of allegiance to the King of Italy in 1931.

Thus, the opinion was oriented specifically around the facts of the *Panzica* case, and is not an authority for the broad proposition that conscription alone establishes a presumption of involuntariness. On the contrary, the opinion expressly takes into consideration the fact that circumstances surrounding one's induction may determine whether or not conscription is indicative of duress. At most, the ruling may establish such a presumption where the dual-national had grown up in the foreign country where all his home ties were, and, as a practical matter, he had no alternative but to submit to induction, as in Fascist Italy. But it has no bearing on the very different facts of a case such as this.

3. In this case, a dual-national grew up in the United States, received a college education here, and then went voluntarily, as an adult, to the foreign country when he was of draft age, knowing his name was in the family register there and that he was a national of that foreign country, which was then engaged in military conflict and was conscripting soldiers. The trial court even found that he knew "he was likely to be called for military service" when

he went to Japan" (R. 11). From the time (June 1940) when he received his draft notice until he was inducted (March 1941), he made no effort at all to be relieved from service or to seek help from the American authorities, nor did he seek to return to this country. Even in a totalitarian state, involuntariness should not be assumed from the mere fact of conscription in a case like this, particularly when there is no indication of any attempt to avoid foreign conscription. In 40 Op. Atty. Gen. 553, 554, Attorney General Clark pointed out that each case must be considered in the light of its own facts and circumstances. He also referred to involuntary service as comprising a situation where "avoidance thereof is not within the power of the individual". Petitioner voluntarily subjected himself to the foreign draft law, and there was no showing that he could *not* have avoided service if he had tried. In fact, the trial court thought that he wished to serve (*supra*, p. 8, fn. 1; R. 56–57)."

In sum, the mere fact of conscription—which is all that petitioner can now properly call to his support (see *supra*, p. 25)—is insufficient to sustain his burden of producing evidence of duress to overcome the presumption of voluntariness in his performance

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[14] Petitioner frequently cites *Kawakita* v. *United States*, 343 U. S. 717, (Pet. Br. 19, 34, 36, 37, 44), but Kawakita never served in the Japanese armed forces (see 343 U. S. at 727–728) and his case is not at all analogous to petitioner's. Moreover, the issue of expatriation in Kawakita's case arose in the context of a criminal trial, and the Government therefore proved (as the jury specifically found) all the relevant factors beyond a reasonable doubt.

of the expatriating act. He simply failed to make a *prima facie* showing of duress. Consequently, there was no need for the Government to come forward with evidence of voluntariness in rebuttal; the case stood as if petitioner had not controverted, or sought to explain, his performance of the expatriating act. On this view, there is no need to reach the issue of the ultimate burden of proof (as distinguished from the burden of going forward with evidence of duress). The ruling below can rest simply on the proposition that the expatriating act, proved by clear and convincing evidence (and indeed admitted), has not been adequately challenged.[7]

C. The ultimate burden of proving the involuntariness of the expatriating act rests on the person claiming citizenship

If petitioner's evidence of duress can be said to be sufficient to sustain his burden of coming forward with a showing of duress—and thereby to neutralize

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[7] It is clear that, even if the ultimate burden of proof (with respect to duress) is on the Government, the decision must go against petitioner if his evidence in support of the claim of duress is insufficient to carry his burden of coming forward with adequate proof to make a *prima facie* case of duress. Cf. *Davis* v. *United States*, 160 U. S. 469, in which evidence had been introduced to rebut the presumption that the defendant was sane, and no evidence was introduced by the prosecution in support of the presumption; the question considered in the opinion was whether the defendant must rebut the presumption by a preponderance of the evidence or merely by creating a reasonable doubt; and the court chose the latter alternative; but the underlying assumptions are that the question is one for the jury to decide, though the only evidence for the jury to consider be evidence contradicting the presumption, and that the jury can competently decide, in the face of such evidence, that the defendant is sane. The *Davis* decision was followed in *Matheson* v. *United States*, 227 U. S. 540.

the presumption of voluntariness as to his foreign military service—the question would then arise as to where the ultimate burden of proof lies. Is it like the issue of sanity in a criminal case where the ultimate burden of proof never shifts, *i. e.*, where, when there is a sufficient showing of insanity to take that issue to the jury, the Government must prove sanity? And if so, is the "strict standard" of "clear and convincing" evidence applicable?[18] Or does the burden rest on the claimant to avoid the effect of the expatriating act by proof that it was involuntarily performed? We think that the legislative history clearly shows that Congress intended the burden of proof to rest on the claimant, that voluntariness of foreign military service was not made a condition precedent to expatriation, but rather that involuntariness was made a *proviso* which, if established by the claimant, would take his particular case out of the statute.

H. R. 6127, 76th Cong., 1st Sess., was introduced into the House of Representatives on May 3, 1939. It was referred to the Committee on Immigration and Naturalization which gave it lengthy consideration. In the course of the hearings, Mr. Richard W. Fluornoy, Assistant Legal Adviser of the State Department, proposed a proviso to Section 401 (c) directing that there be a *conclusive* presumption of voluntariness in all cases of dual nationality. In

[18] *Bruni* v. *Dulles*, 235 F. 2d 855 (C. A. D. C.), so holds with respect to expatriation. The other decisions which regard conscription as enough to show involuntariness are not clear, since there was no real need in those cases to reach this question of ultimate burden of proof.

other words, he wished the subsection to be changed so that all dual nationals would forfeit American citizenship whether the service in the foreign army was voluntary or involuntary. No further reference to this proposed amendment was made in either the Senate or the House, but it was strongly opposed by the representative of the Labor Department who was present at the hearing. He objected to making the presumption conclusive and maintained that, in all cases, the American citizen should be *permitted to establish* that his service in the foreign army was in fact not voluntary; the representative of the Department of Justice concurred with this view. See Hearings before the Committee on Immigration and Naturalization on H. R. 6127, House Committee Print, pp. 149–156, 168–170, 200–203, 76th Cong., 1st Sess.; *Dos Reis* v. *Nicolls*, 161 F. 2d 860, 863–868 (C. A. 1). For present purposes, the significance of the view of the Departments of Justice and Labor was that, under the new Act, the citizenship-claimant was to be permitted to establish duress, if he could; the Government was not to be put to the task of disproving duress.

During the same committee hearings, Mr. Henry F. Butler, representing the National Council on Naturalization and Citizenship, urged that the word "voluntarily" be inserted in proposed subsections (b) through (g) of Section 401 for the purpose of excluding persons who involuntarily entered or served in foreign armies. The Committee did not insert the word in any of the subsections. See Hearings before the Committee on Immigration and Natural-

ization, House Committee Print, pp. 397–403, 76th Cong., 1st Sess. Since it was intended that Section 401 (c) apply only to cases of voluntary service (see *Dos Reis* v. *Nicolls*, *supra*), the significance of the Committee's failure to insert the word "voluntary" in the statute seems to be this: if "voluntary" were actually made an integral part of the expatriating clause of the statute, it might be contended (as petitioner contends here, Pet. Br. 10) that voluntariness is a condition precedent to expatriation, and hence must ultimately be proved by the Government. Instead, when the issue was squarely presented for consideration, the insertion of the word in the statute was rejected.

Subsequently, several amendments, not part of the original draft code, were proposed to the 1940 Act. Among them was Section 503, 8 U. S. C. (1946 ed.) 903, under which petitioner in this case instituted his action. H. Rep. No. 3019, 76th Cong., 3d Sess.; 86 Cong. Rec. 12818, 13183, 13244 (Sen. Amend. No. 5 to H. R. 9980, which superseded H. R. 6127, *supra*). When Section 503 came before the House, it, along with the other amendments, engendered considerable discussion. 86 Cong. Rec. 13247–13248, 13250. Answering questions concerning the purpose and operation of the amendments, Mr. Rees, a member of the Committee on Immigration and Naturalization and one of the House Conference Members who submitted H. Rep. No. 3019, *supra*, stated flatly, "In this act we put the burden of proof upon that individual to show that he is a citizen or a national of the United States." 86 Cong. Rec. 13248.

Further reason for holding that involuntariness is a proviso or defense which the claimant must establish appears from Section 402 of the Nationality Act of 1940, 8 U. S. C. (1946 ed.) 802, which provides (as it appears in the U. S. Code):

> A national of the United States who was born in the United States * * * shall be presumed to have expatriated himself under subsection (c) or (d) of Section 801 of this title, when he shall remain for six months or longer within any foreign state of which he or either of his parents shall have been a national according to the laws of such foreign state * * * *and such presumption shall exist until overcome, whether or not the individual has returned to the United States. Such presumption may be overcome on the presentation of satisfactory evidence* to a diplomatic or consular officer of the United States, or to an immigration officer of the United States, under such rules and regulations as the Department of State and the Department of Justice jointly prescribe * * *. [Emphasis added.]

Section 402 does not enlarge upon the substantive requirements of Section 401 (c), but the force of Section 402 is not spent unless petitioner shows he was not expatriated under Section 401 (c) or (d). *Kawakita* v. *United States*, 343 U. S. 717, 730. What the section says is that a "rebuttable presumption of expatriation" (343 U. S. at 730) arises if the national stays in the foreign state six months or longer, since it is assumed that he either served in the armed forces of the foreign state (401 (c)) or took a government job for which only a national of that state could qualify (401 (d)). This presumption can be over-

come, of course, by proof that the claimant did not enter the foreign army or take a government job, but until proof is made, the presumption of expatriation "shall exist". And it is crystal clear that the section places the burden of proof upon the claimant.

When a person, like petitioner, has actually served in a foreign army, the force of Section 402 is obviously not spent; the presumption of expatriation remains, or, rather, would become even stronger since the claimant has actually performed an act of expatriation referred to in Section 402. Under that provision, it will continue to be presumed until the presumption is "overcome"—that petitioner has met all the requirements of Section 401 (e), including the fact that he performed his act of expatriation voluntarily. To overcome this continuing presumption under Section 402, the claimant would then have to prove duress or some other factor in avoidance of expatriation by affirmative evidence. Again, the terms and structure of Section 402 plainly shows that the burden of "overcoming" the presumption would be his.

Section 402 thus has a direct bearing on petitioner's burden of proof, since his case falls squarely within that Section. But the section also has a wider bear-

It is significant to note that Section 352 (a) (1) of the Immigration and Nationality Act of 1952, 8 U.S.C. (1952 Ed.) Supp. V, p. 1, which replaced Section 401 (e) of the 1940 Act, spells out a conclusive presumption of voluntariness on the part of a dual national who acquires the citizenship of the foreign state if he had resided in that state an aggregate of ten years or more immediately prior to his acquisition. Since such was the intent of Congress in 1952, the existence of a much less drastic *rebuttable* presumption in the 1940 Act seems reasonable. As for the 1952

ing on the issue of burden of proof of duress as a defense to expatriation, in general. Congress has indicated in this provision—as in the other materials to which we have referred (*supra*, pp. 34-36)—that it is not averse to placing burdens of proof upon the citizenship claimant. The expatriation provisions of the Nationality Act of 1940 are not instinct with the assumption that the Government must affirmatively prove every facet and factor in a case of loss of nationality; rather, the statute recognizes throughout that the claimant has serious burdens of proof which he must shoulder. Cf. *McGrath* v. *Abo*, 186 F. 2d 766, 774 (C. A. 9).

2. The rule of burden of proof of duress which we urge should be applied here is that laid down in relation to affirmative defenses in land grant and patent cases, as well as announced in other comparable rulings. The land grant and patent decisions are particularly applicable because they require the same "clear, unequivocal and convincing" standard of proof required in denaturalization and expatriation cases. *Maxwell Land Grant Case*, 121 U. S. 325, 380-381. See *Gonzales* v. *Landon*, 350 U. S. 920; *Schneiderman* v. *United States*, 320 U. S. 118, 125. In *Wright Blodgett Co.* v. *United States*, 236 U. S. 397, appellant made an argument similar to the one petitioner makes here. On pages 402-403, 405, this Court said:

> * * * In substance, the argument comes to this: that in a suit by the United States to cancel a patent upon the ground of fraud,

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Act, it would not seem logical that Congress intended to presumption of voluntariness to exist at all up until the time the conclusive presumption would become operative.

> where the land is held by a grantee of the entryman, the Government must establish that the grantee is not a *bona fide* purchaser for value; that this must be shown by proof of a clear and cogent character; and that, measured by this standard, the Government's case was not made out. * * * In such case, the respect due to a patent, the presumption that all the preceding steps required by the law had been observed before its issue, and the immense importance of stability of titles dependent upon these instruments, demand that suit to cancel them should be sustained only by proof which produces conviction. [Citations] And, despite satisfactory proof of fraud in obtaining the patent, as the legal title has passed, *bona fide* purchase for value is a perfect defense. [Citations] *But this is an affirmative defense which the grantee must establish in order to defeat the Government's right to the cancellation of the conveyance.* * *. [Emphasis added.]

The same rationale has found cogent expression in other cases decided by this Court. In *United States v. Fleischman*, 339 U. S. 349, the House Committee on Un-American Activities issued subpoenas to each of the members of the executive board of an association which was under investigation. The Court held, *inter alia*, that, after introducing evidence that the executive board had power to produce the records and that it had not done so, the Government did not have the further burden of proving that each individual member had not done that which was within his power to bring about compliance with the Committee's order, but that the board members must advance excuses for

nonaction as defensive matter. The Court said, on pages 360–361:

> We think that the circumstances of this case fairly bring into play the familiar doctrine in criminal cases that "it is not incumbent on the prosecution to adduce positive evidence to support a negative averment the truth of which is fairly indicated by established circumstances and which if untrue could be readily disproved by the production of documents or other evidence probably within the defendant's possession or control." *Rossi* v. *United States*, 289 U. S. 89, 91–92 (1933), and authorities cited. The considerations that govern this question have been well stated by Mr. Justice Cardozo in discussing a similar question the constitutionality of a statute which shifted the burden of proof in a criminal prosecution to the defendant.

The Cardozo opinion referred to in the *Fleischman* case was *Morrison* v. *California*, 291 U. S. 82, in which this Court reversed a conviction under Section 9a of the California Land Law as lacking in due process. Under California law, an alien who was neither a citizen or eligible for naturalization (with certain exceptions) could not occupy land for agricultural purposes. Section 9a provided that if an indictment alleged alienage, the burden of proving citizenship was on the defendant. In holding Section 9a invalid, this Court distinguished it from another section of the California Land Law previously held valid, saying (pp. 87–91):

> This court in *Morrison* v. *California*, 288 U. S. 591, passed upon a controversy as to the

validity of § 9b of the California Land Law, which although akin to § 9a, has important elements of difference. This section (9b) provides in substance that when it has been proved that the defendant has been in the use or occupation of real property and when it has also been proved that he is a member of a race ineligible for citizenship under the naturalization laws of the United States, the defendant shall have the burden of proving citizenship as a defense. We sustained that enactment when challenged as invalid under the Fourteenth Amendment of the federal constitution. The state had given evidence with reference to the defendant, the occupant of the land, that by reason of his race he was ineligible to be made a citizen. With this evidence present, we held that the burden was his to show that by reason of his birth he was a citizen already, and thus to bring himself within a rule which has the effect of an exception. In the vast majority of cases, he could do this without trouble if his claim of citizenship was honest. The People, on the other hand, would be relatively helpless. In all likelihood his life history would be known only to himself and at time to relatives or intimates unwilling to speak against him.

The ruling was not novel. The decisions are manifold that within limits of reason and fairness the burden of proof may be lifted from the state in criminal prosecutions and cast on a defendant. The limits are in substance these, that the state shall have proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation, or at least that upon a balancing of

convenience or of the opportunities for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression. Cf. Wigmore, Evidence, Vol. 5, §§ 2486, 2512 and cases cited. *Special reasons are at hand to make the change permissible when citizenship vel non is the issue to be determined.* Citizenship is a privilege not due of common right. One who lays claim to it as his, and does this in justification or excuse of an act otherwise illegal, may fairly be called upon to prove his title good. In accord with that view are decisions of this court in proceedings under the acts of Congress for the deportation of aliens. A Chinaman by race resisted deportation on the ground that, though a Chinaman, he had been born in the United States. The ruling was that as to the place of birth the burden was upon the alien, and not upon the Government. The ruling also was that the imposition of that burden did not deprive the alien of his constitutional immunities. *Chin Bak Kan* v. *United States*, 186 U. S. 193, 200. * * *

* * * For a transfer of the burden, experience must teach that the evidence held to be inculpatory has at least a sinister significance [citing cases], or if this at times be lacking, there must be in any event a manifest disparity in convenience of proof and opportunity for knowledge, as, for instance, where a general prohibition is applicable to every one who is unable to bring himself within the range of an exception. Greenleaf, Evidence, Vol. 1, § 79. The list is not exhaustive. Other instances may have arisen or may develop in the future where

> the balance of convenience can be redressed without oppression to the defendant through the same procedural expedient. The decisive considerations are too variable, too much distinctions of degree, too dependent in [the] last analysis upon a common sense estimate of fairness or of facilities of proof, to be crowded into a formula. One can do no more than adumbrate them; sharper definition must await the specific case as it arises. [Emphasis added.]

See also *Schlemmer* v. *Buffalo, Rochester, etc. Ry.*, 205 U. S. 1, 10, where the court applied the "general rule" that a proviso must be set up and proved by the party relying on it.

3. This rule as to burden of proof in no way runs counter to *Gonzales* v. *Landon*, 350 U. S. 920, which held that the standard of proof required in denaturalization cases applies to expatriation case arising under Section 401 (j) of the Nationality Act of 1940 (added by the Act of September 27, 1944, 58 Stat. 746). That case involved expatriation by remaining outside the jurisdiction of the United States for the "purpose of evading or avoiding" military training and service, and the Court's ruling related to *the standard of proof necessary to establish the performance of the expatriating act*, which in that case included, by definition, the state of mind of the citizen, *i. e.*, his purpose. Under Section 401 (c), the expatriating act is objectively defined, and there is no doubt that here the expatriating act was established by clear and convincing evidence since petitioner pleaded it in the complaint (R. 4) and the Government admitted it in the answer (R. 6). Of course, if the expatriating act is not admitted, it must be proved by clear and convincing evidence under *Gonzales*, *supra*. But the claim of duress

in such cases is a matter of avoidance of the effect of the expatriating act, once it had been properly proved. Gonzales did not deal with that separate issue. As we have pointed out, *supra*, pp. 34 ff, a showing of duress is not a condition precedent to expatriation, as is proof of intent to avoid military service under Section 401 (j), but rather is in the nature of a proviso which puts the burden of proof of involuntariness on the claimant.[18]

D. Whatever the burden of proof as to duress, the voluntariness of petitioner's expatriation has been sufficiently established

1. If petitioner has the ultimate burden of proving duress, he has so clearly failed to do so that further discussion is unnecessary. The trial court and the Court of Appeals have held against him on his own evidence. See the Statement, *supra*, pp. 6–8, and discussion *supra*, pp. 31–32, and *infra*, pp. 45–48.

2. Even assuming that the ultimate burden of proof rests on the Government to show voluntariness, we believe that that burden has been sustained in this case.

(*a*) The trial judge's formal findings (R. 11–12) and his remarks at the close of the trial (R. 55–59)

[18] There is, of course, at least one affirmative defense as to which the burden of proof is on the other party—the issue of insanity in federal criminal trials. Under *Davis* v. *United States*, 160 U. S. 469, the Government—though it does *not* have the initial burden of coming forward with evidence on that issue (*supra*, p. 23)—does have the ultimate burden of proving sanity beyond a reasonable doubt, once that question has been properly raised by the defendant (*supra*, p. 23). This federal rule in criminal cases rests, as the Court explicitly pointed out in *Davis*, on grounds of humanity peculiar to criminal matters. In the light of the background we have discussed (*supra*, pp. 25–34), it would be inappropriate to carry the rule over to civil proceedings involving expatriation. See also, *infra*, pp. 48–49.

supra, pp. 6–8, fn. 1 show that, on the basis of the petitioner's own testimony, the court affirmatively found that petitioner acted voluntarily—regardless of where the burden of proof might be.[*] The judge disbelieved petitioner's protestations of fear and believed that petitioner was willing, as a Japanese national, to be conscripted in order to do his duty as a loyal Japanese subject. See R. 56–57; *supra*, p. 8, fn. 1. And although the Court of Appeals did hold that the burden was on petitioner (R. 73), it also took care, independently of that legal ruling, to affirm the trial court's findings as adequately based on the evidence (R. 73–74). It pointed out that on this record the trial court was entitled "to find that the facts were otherwise than stated by the plaintiff [petitioner]" and "was not required to believe that appellant [petitioner] was himself the victim of terror conditions in Japan" (R. 74). It concluded that the "record here amply supports the conclusion of the lower court that the act of the plaintiff [petitioner] in entering the Japanese army was a voluntary act" (R. 74).

(*b*) These two-court findings-of-fact are soundly grounded in the evidence, as we have already pointed out. *Supra*, pp. 25, 31–32. Petitioner, an engineering graduate of the University of California (R. 46), went to Japan when he was of draft age, in the sum-

[*] It should be noted that District Judge Byrne, the trial judge here, has heard a very large number of cases, in the District Court for the Southern District of California, involving claimed expatriations on the ground of serving in the Japanese armed forces, voting in Japan, etc. He is particularly experienced in this field.

mer of 1939, knowing that he was a national of Japan whose name was in the family register there (R. 34), and knowing that Japan was then fighting in Manchuria (R. 25). Less than a year later, in the summer of 1940, he took a physical examination (R. 18) pursuant to the Japanese military conscription law (R. 22–23). Approximately nine months after that, in March 1941, petitioner was inducted into the Japanese army (R. 18). At no time during this interval did he seek to return to the United States, renounce Japanese nationality, or make any effort to avoid the Japanese draft by contacting American consular officials (R. 26–27). Nor did he protest his induction notice or seek relief from Japanese officials (R. 30). He testified that he did not protest his induction because he was afraid of the Kempi Tai (political police) (R. 37) and because he was told by friends that the American consulate could do nothing for him (R. 27). Yet the fact remains that he made absolutely no effort at all really to find out what his chances were. It seems hardly credible that fear was then the motivating factor when he was still a civilian and might possibly have extricated himself from his alleged predicament—particularly when one considers the fact that he was so rash as to tell his army comrades later, after this country had entered the war and when he was subject to the close scrutiny of army discipline, that America would win the war. *Supra*, p. 6. When he made that alleged statement he intimates that he was asking for martyrdom as an American patriot, for he was "beaten for about almost every day for a month; and a couple days a

month after * * *" (R. 38). But this does not jibe at all with his account of prior timorousness. Moreover, despite the fact that petitioner corresponded with his friends in the United States once a week (R. 28) and with his mother every two weeks (R. 30), besides meeting with Japanese friends who were American citizens (R. 28), he claimed he did not know that the United States was drafting men during the interval between his physical examination and his induction into the Japanese army (R. 28, 30). Although he was well educated, petitioner denied reading newspapers while in Japan (R. 26) and said he did not know there was a "cold" war between Japan and the United States (R. 46). Even if it were expedient for him to serve, "the forsaking of American citizenship, even in a difficult situation, as a matter of expediency, * * *" is not duress. *Perri* v. *Marshall*, 170 F. 2d 721, 724 (C. A. 3); *Savorgnan* v. *United States*, 338 U. S. 491, 502.

In short, petitioner's course of conduct is diametrically opposed to his contention that his service was involuntary, and is consistent only with the findings of voluntariness made below.

(c) If the burden of proof of voluntariness is upon the Government, it is not clear whether the standard should be that of "clear and convincing evidence" (as held by *Brini* v. *Dulles*, 235 F. 2d 855 (C. A. D. C.)), or merely the normal standard of "preponderance of the evidence." We suggest that the former may be too high a criterion for proof of a fact which is so intangible, so intimately linked with an individual's private will and particular

mentality, as "voluntariness". The claimant proves his initial citizenship merely by a preponderance of the evidence (*Ly Shew* v. *Dulles*, 219 F. 2d 413, 416 (C. A. 9); *Lue Chow Kon* v. *Brownell*, 220 F. 2d 187 (C. A. 2)); the Government must then prove the actual commission of a specific act of expatriation by "clear and convincing" evidence (*Gonzales* v. *Landon*, 350 U. S. 920). To show that the act was performed voluntarily, it should be sufficient for the Government (if it has the burden) merely to adduce a preponderence of the evidence—especially in view of the claimant's exceptional opportunity to give testimony as to his private, inner, feelings, which cannot be directly controverted.

But if the proper standard is "clear and convincing" evidence, it was met here. The trial judge made it plain that he was convinced of petitioner's freedom from coercion (R. 55–58). In affirming the trial findings, the Ninth Circuit adverted to the "clear and convincing proof" against petitioner's contention (R. 74). See also, *supra*, p. 46.

3. Petitioner attempts to bolster the record by certain materials, bearing on conditions in Japan, of which he now asks the Court to take judicial notice (Pet. Br. 6–7, 22–24, Pet. Appx. 1–3). None of this material was introduced at the trial by experienced counsel, although it was then available. It obviously has no place in this proceeding and should be disregarded. Petitioner chose at the trial to stand on his own testimony, and he cannot now enlarge the record by a cavalier reference to disputed materials, somewhat comparable to those which have

been offered and often introduced at other expatriation trials, but which were not proffered here.

In any event, "each [expatriation] case must stand upon its own facts" (*Soccodato* v. *Dulles*, 226 F. 2d 243, 244 (C. A. D. C.)), and petitioner's case is quite different from the many others in which duress has been found on the basis of a combination of general evidence of Japanese conditions together with the claimant's own testimony as to his feelings, activities, and experiences.[2] The significant evidence here was petitioner's own testimony, and it was on that basis that the two courts below decided against him. *Supra*, pp. 45–46.

II. Section 401 (c) of the Nationality Act of 1940 is constitutional

Petitioner contends that the designation by Congress of service in a foreign army by an American-born dual-national as causing loss of nationality is beyond the constitutional powers of Congress. This issue is discussed in the Government's brief in *Perez* v. *Brownell*, No. 572, this Term, involving loss of nationality by reason of remaining in a foreign country to evade military service and by reason of voting in the foreign country. The Court is respectfully referred to that discussion for our argument on the issue of constitutionality.

We add a few words on the extraordinary argument (Pet. Br. 36–40) that, to avoid constitutional doubts, Section 401 (c) should be construed as not applying

[2] Judge Byrne, the trial judge here, has often found service in the Japanese army to have been under coercion.

to dual nationals—even though petitioner's service in the Japanese army is found to have been voluntary. We characterize the contention as extraordinary because, by its express terms, Section 401 (c) can apply *only* in the case of a dual national. *Supra*, p. 3. Under petitioner's suggested construction, that section would have absolutely no application or function whatever.

CONCLUSION

It is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

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